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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 11-1-12

SUBMITTED LATE

October 24, 2012

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH by RMK*
General Counsel

Kevin Deeley *KD by RMK*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

Subject: AOR 2012-25 (AFF/AFFPA/McIntosh)

Attached is a letter seeking reconsideration of the subject advisory opinion request. We have been asked to have this letter placed on the Open Session agenda for November 1, 2012.

Attachment

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October 15, 2012

Chair Caroline Hunter
Vice Chair Ellen Weintraub
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request 2012-25

Dear Chair Hunter and Vice Chair Weintraub,

We are in receipt of the Commission's close-out letter in response to Advisory Opinion Request 2012-25 (American Future Fund & American Future Fund Political Action). We appreciate the Commission's consideration of multiple draft responses, but respectfully request reconsideration of the matter by the Commission.

On Friday, October 12, 2012, shortly after 6:00 pm, we received an automated e-mail from the Commission notifying us that a close-out letter was now available. Approximately 15 minutes later, we received a non-automated email containing copies of Draft D, Draft E, and the close-out letter. As you know, the Commission divided 3-3 on both Draft D and Draft E. It is readily apparent from both Drafts and their vote certifications, however, that the Commission is in unanimous agreement that the activity proposed in Advisory Opinion Request 2012-25, as revised by the requestor, is permissible under the Act and Commission regulations. Specifically, both Draft D and Draft E answer Questions #1 and #2 affirmatively. Disagreements among the Commissioners appear to boil down to how the questions presented should be addressed.

Surprisingly, though, the Commission simply issued a close-out letter indicating that "the Commission was unable to render an opinion in this matter." We believe the Commission could, in fact, render an opinion in this matter by producing a simple response indicating that the Commission agrees that the proposed activity is permissible under the Act and Commission regulations, but that the Commissioners are not able to agree on a single rationale. This response could be accompanied by one or more statements from the Commissioners explaining their reasoning.

While we may infer from the votes on Draft D and Draft E that the Commission agrees that the proposed activity is permissible, our client cannot rely on two split votes and a close-out letter under 2 U.S.C. § 437f(c).

During the week of October 12, we granted the Commission two extensions of time to consider this matter. If asked, we would gladly have granted the Commission an additional extension so that it could have produced a response similar in nature to AO 2010-19 (Google), AO 2010-07 (Yes on FAIR), AO 2007-28 (McCarthy/Nunes), AO 2005-10 (Berman/Doolittle), AO 2004-43 (Missouri Broadcasters), or AO 2003-25 (Weinzapfel). In each of these matters, a majority of Commissioners agreed on the basic answer to the request, but groups of Commissioners held different views on the reasoning behind that answer. As a result, the Commission provided the requestor with a bare-bones response joined by two or more Commission statements or opinions explaining the differing rationales employed. This type of response is of far greater value to the requestor, and the regulated community as a whole, than a non-response.

We therefore respectfully request that the Commission reconsider and withdraw its October 12 response to Advisory Opinion Request 2012-25, and vote to approve a response indicating that the Commission agrees that the proposed activity is permissible, but that no single rationale obtained majority support among the Commissioners. Any Commissioner who wishes to explain his or her views in more detail would, of course, be free to file a concurring opinion or separate statement. Most importantly, the requestor would receive an actual answer to the questions posed that could be relied upon under 2 U.S.C. § 437f(c).

Thank you for your continued consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'Jason Torchinsky', with a stylized flourish at the end.

Jason Torchinsky
Michael Bayes

Counsel to American Future Fund and
American Future Fund Political Action

cc: Commissioner Bauerly
Commissioner McGahn
Commissioner Petersen
Commissioner Walther
General Counsel Herman